



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case No: 944/13
Not reportable

In the matter between:

JOSHUA NEMUTANDANI

Appellant

and

THE STATE

Respondent

Neutral citation: *J Nemutandani v The State* (944/13) [2014] ZASCA 128
(22 September 2014)

Coram: BRAND and MBHA JJA and MATHOPO AJA

Heard: 9 September 2014

Delivered: 22 September 2014

Summary: Criminal Law – appellant convicted for murder and robbery for which he was sentenced to 20 years and 18 years' imprisonment respectively – sentences not ordered to run concurrently – misdirection by court a quo – sentences ordered to run concurrently.

ORDER

On appeal from the Limpopo High Court, Thohoyandou (Makgoba AJ) sitting as court of first instance):

1 The appeal against sentence is upheld to the extent that the sentence imposed on count 2 (robbery) is ordered to run concurrently with the sentence imposed on count 1. The appellant will thus serve an effective term of 20 years' imprisonment.

2 The sentence is antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977 to 10 November 2004.

JUDGMENT

MBHA JA (BRAND JA and MATHOPO AJA CONCURRING)

[1] The appellant and two co-accused were arraigned in the Limpopo High Court, Thohoyandou before Makgoba AJ (the trial court) on the counts of murder and robbery with aggravating circumstances which were read together with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997. On 10 November 2004 all three accused were convicted as charged and sentenced to 20 years imprisonment for murder and 18 years' imprisonment for robbery respectively. The sentences were not ordered to run concurrently and the accused were thus sentenced to an effective term of 38 years' imprisonment. Almost 11 years later the appellant applied for leave to appeal from the court below. On 14 March 2013 leave to appeal to this Court was granted in respect of sentence only.

[2] The only ground of appeal against sentence is that the trial court committed a misdirection in not ordering the sentences to run concurrently.

Before I consider this issue, I deem it necessary to briefly set out the background facts of the matter which can be gleaned from the evidence that was led at the trial.

[3] At the trial the appellant was indicted as accused 2 whilst his co-accused (Mmboi and Mudau) appeared as accused 1 and 5 respectively. All three were initially indicted together with two other persons namely Eric Todani (accused 3) and Emmanuel Radzuma (accused 4). However, at the commencement of the trial charges were withdrawn against Todani and Radzuma who later testified for the State after they had been warned in terms of s 204 of the Criminal Procedure Act 51 of 1977.

[4] The evidence disclosed that on 21 December 2003 in the evening, all five accused had sat together as a group at the Tshivumba Bar Lounge drinking liquor. The deceased was also present at the bar and drinking with his friends at a table close by. One of the appellant's co-accused suggested that they rob the deceased as he had a lot of money which was deduced from the fact that the deceased was drinking expensive liquor. At around 21h00 the deceased left the bar with three of his companions and the appellant and his co-accused decided to follow and rob him of his money as was previously agreed. When they got to a certain spot the appellant left the group saying he was going to the deceased to take his money and the canvass shoes he was wearing from him. The appellant struck the deceased with a beer bottle whereupon the deceased said he had no money and that the appellant could go on and kill him. The appellant then went to Mudau, accused 5, and took a knife from him which he then used to stab the deceased three times. The deceased fell and the appellant removed the white canvass shoes the deceased was wearing. The deceased died later that night as a result of the stab wound that had been inflicted by the appellant.

[5] I interpose to state that Mmboi and Mudau were subsequently granted leave to appeal to this court. On 28 September 2012 the conviction of Mmboi was set aside whilst Mudau's appeal against sentence was upheld only to the

extent that the sentence imposed on count 2 (robbery) was ordered to run concurrently with the sentence imposed on count 1 (murder).¹

[6] It is trite that sentencing is a matter that is wholly within the discretion of the trial court. The power of an appeal court to intervene is limited to instances where the trial court has misdirected itself on the law or facts, if it has committed an irregularity which vitiates the sentence, and also in instances where the sentence imposed by the trial court differs so greatly from the one the appeal court would itself have imposed.²

[7] This term of imprisonment of 38 years that was imposed on the appellant – who was 21 years old at the time – appears to me to be unduly harsh. It is noteworthy that Makgoba AJ, when granting the appellant leave to appeal to this Court, even commented that the sentence appeared to be shockingly inappropriate and that another court could decide the matter otherwise.

[8] This Court has previously warned against excessively long sentences being imposed by trial courts. Thus in *S v Mhlakaza*³ this court had occasion to consider whether sentences of imprisonment which are cumulatively in excess of 25 years, are proper and whether they have any rehabilitative effect. Harms JA cautioned that sentences of imprisonment ought to be realistic and should not be open to the interpretation that they have been designed for public consumption.⁴

[9] As can be seen from the facts, the murder committed by the appellant was inextricably linked to the robbery of the deceased during which the deceased's canvass shoes were removed and taken. It is trite law that an order for sentences to run concurrently is always called for where the evidence shows that the relevant offences are inextricably linked in terms of

¹*Mmboi & another v S* (167/2012) [2012] ZASCA 142 (28 September 2012).

²*S v Kgosimore* 1999 (2) SACR 238 (SCA) para 10.

³1997 (1) SACR 515 SCA at 519g.

⁴At 524A.

locality, time, protagonists and, importantly, the fact that they were committed with one common intent.⁵

[10] In *S v Senatsi & another*,⁶ Mthiyane JA gave recognition to the role of mercy in sentencing by saying one way in which it could be accorded to the accused was through ordering that sentences imposed should run concurrently.

[11] Counsel for the respondent has conceded, correctly in my view, that the trial court committed an irregularity by not ordering the sentences to run concurrently. What aggravates the matter even further is that the trial court even omitted to furnish any reasons for this decision. Clearly, the trial court never even considered the cumulative effect of the sentence that was imposed. Accordingly the appeal against sentence must succeed albeit to the limited extent that the sentences that were imposed on the appellant will be ordered to run concurrently.

[12] In the result the following order is made:

1 The appeal against sentence is upheld to the extent that the sentence imposed on count 2 (robbery) is ordered to run concurrently with the sentence imposed on count 1. The appellant will thus serve an effective term of 20 years' imprisonment.

2 The sentence is antedated in terms of s 282 of the Criminal Procedure Act 51 of 1977 to 10 November 2004.

B H MBHA
JUDGE OF APPEAL

⁵*S v Mokela* 2012 (1) SACR 431 (SCA) para 11.

⁶2006 (2) SACR 291 SCA para 6.

APPEARANCES:

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